

# The 2008 ADA Amendments Act (ADA-AA)



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# Disclaimers

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# **ADA-AA**

## **(aka Public Law No: 110-325)**

◆ Signed into law by President Bush on  
**September 25, 2008**

◆ **Effective January 1, 2009**

# ADA Amendments Act

## Findings and Purposes

### Findings:

- a) Congress found “**disability**” was not **interpreted under ADA as broadly** as it had been under the Rehabilitation Act of 1973.
- b) Congress found the **EEOC ADA regulations** equating “substantially limited” as “significantly restricted” expressed too high of a bar for legal protection

# Congressional Intent

## ◆ SEC. 2. FINDINGS AND PURPOSES.

(b) PURPOSES.—Congress finds that—

“...to convey that it is the **intent of Congress that the primary object of attention** in cases brought under the ADA **should be whether entities covered under the ADA have complied with their obligations**, and to convey that the question of whether an **individual’s impairment is a disability under the ADA should not demand extensive analysis;**”

# Findings and Purposes (cont.)

## Purposes:

c) To reject the Supreme Court's decision in *Toyota* imposing a demanding standard of “**Substantially limits**”

✦ *Toyota* said “substantially limits” meant the **impairment prevents or “severely restricts”** the individual from activities **essential to most people's daily lives**

✦ While the ADA- AA rejects this demanding standard and the EEOC definition, it **does not** define “**substantial**”

# Findings and Purposes (cont.)

## Purposes:

d) To reject the Supreme Court's decision in *Sutton* requiring consideration of mitigating measures when determining a substantial limitation

- ✦ ADA-AA states determinations shall be made “**without regard**” to beneficial effects of mitigating measures.

- ✦ **Exception:** Regular eyeglasses or contacts

# Mitigating Measures

- ◆ Medication
- ◆ Medical supplies, equipment, or devices
- ◆ Low vision devices (NOT ordinary glasses/lenses)
- ◆ Prosthetics
- ◆ Hearing aids
- ◆ Mobility devices
- ◆ Use of assistive technology
- ◆ Reasonable Accommodations
- ◆ Learned behavior or adaptive neurological modifications



# Discrimination Verbiage Change

- ◆ The Act now conforms with Title VII and language found in other civil rights laws by requiring an individual to demonstrate discrimination “on the basis of disability” rather than discrimination against a qualified individual “with a disability because of the disability of such individual”

# Disability Defined Today

- ◆ An individual with a “disability” is any person who:
  - ◆ has a **physical or mental impairment** that **substantially limits** one or more **major life activities**;
  - ◆ has a **record of** such impairment; or
  - ◆ is **regarded as** having such an impairment.

# ADA-AA Definitional Changes: Major Life Activities

- ◆ The original ADA did not define major life activities
- ◆ EEOC provided a brief list, but it was not comprehensive so MLA's were determined by courts

# ADA-AA Definitional Changes: Major Life Activities (cont.)

- ◆ MLA's now include, but are not limited to; caring for oneself, manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, **concentrating, thinking, communicating,** and working
- ◆ “Interacting with others” as an MLA is not addressed— this is a major omission.

## Addition: Major Bodily Functions

- ◆ MLA's now include the operation of a **major bodily functions**, including, but not limited to functions of the; immune system, **normal cell growth**, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions

# ADA-AA Definitional Changes: Episodic Impairments

◆ “An impairment that is **episodic or in remission** is a disability if it would substantially limit an MLA when active.”

- ◆ Diabetes
- ◆ Epilepsy
- ◆ MS
- ◆ Cancer
- ◆ Mental Illness

◆ This is a change that invites hypothetical inquiries

# Major Life Activities (cont.)

- ◆ The U.S. House of Representatives Committee on Education and Labor believes that other major life activities include; “interacting with others, writing, engaging in sexual activities, drinking, chewing, swallowing, reaching, and applying fine motor coordination.” H. Rep. No. 110-730, 110th Cong., 2d Sess. (2008).”
- ◆ The National Employment Law Institute reports certain MLA’s may become major life activities
  - ◆ sexual relations
  - ◆ driving
  - ◆ using a computer

# “Regarded As” Pre Jan 1, 2009

- ◆ “Regarded as” usually occurs when an employer makes assumptions regarding an employee’s medical condition. This could lead the employee to believe that decisions were made on the basis of a real or perceived disability. For example:
- ◆ An employee with controlled **high blood pressure** may be restricted by an employer from performing jobs involving strenuous activity or driving trucks.
- ◆ An employee with a **scar** is not hired due to a perception that the applicant may frighten customers.



# Regarded As Post Jan 1, 2009

- ◆ “Regarded as” disabled occurs if s/he “has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.” ADAAA, S.3406 Sect. 4 (2008)
  - ◆ Employee no longer must demonstrate that an impairment is “substantially limiting”
- ◆ The act excludes conditions that are **transitory or less than six months from “Regarded As” coverage**
  - ◆ (Note: Condition must be *both* transitory *and* minor)
- ◆ A person who has been “Regarded As” is not entitled to accommodations
- ◆ Helpful to individuals with adverse action claims, less important to individuals who require an accommodation

# ADA-AA Other Changes

## ◆ Workers' Compensation Standards

- ◆ Eligibility determination for benefits under state comp and disability laws are not affected

## ◆ Reverse Discrimination

- ◆ The Amendment prohibits reverse discrimination claims. (**Lack of disability is not actionable**)

# ADA-AA Other Changes

## ◆ EEOC, Attorney General and Secretary of Transportation

- ◆ Given authority to issue regulations implementing definitions of “disability” consistent with the broad coverage desired by Congress

## ◆ Courts

- ◆ Must give regulations and guidance their proper deference

# What Has Not Changed

- ◆ **Reasonable Accommodation**
- ◆ **Interactive Process** (Now more focus on the employee interview)
- ◆ **Enforcement of Performance Standards and Conduct** (See September 2008 EEOC pamphlet)
- ◆ **Undue Hardship Defense**
- ◆ **Direct Threat Defense**

# What Has Not Changed (cont.)

- ◆ ADA is an not affirmative Action Statute
  - ✦ Accommodations are to **level the playing field**, not provide an advantage
  - ✦ An employer does not have to select a disabled applicant over another equally qualified candidate
- ◆ 10<sup>th</sup> Cir. *Smith Midland Brake* still controls **priority placement for reassignment** if it is the only effective accommodation

# Still NOT Impairments:

- ◆ Physical characteristics, i.e., left-handedness
- ◆ Common personality traits, i.e., irresponsibility, irritability
- ◆ Normal deviations in height, weight, or strength
- ◆ Homosexuality
- ◆ Bisexuality
- ◆ Pregnancy
- ◆ General grief or stress
- ◆ Cultural, environmental, or economic disadvantages

# Conditions Still Expressly Excluded from ADA Protection

- ◆ Transvestism
- ◆ Transsexualism
- ◆ Pedophilia
- ◆ Exhibitionism
- ◆ Many gender identity disorders
- ◆ Sexual behavior disorders
- ◆ Compulsive gambling
- ◆ Kleptomania
- ◆ Pyromania
- ◆ Psychoactive substance use disorders resulting from *current* illegal drug use

# Reasonable Accommodations

- ◆ An Accommodation is a **modification or tool** that assists the employee to perform the essential functions of the job
- ◆ Appropriateness must be determined on a **case-by-case basis**
- ◆ An accommodation is **usually reasonable** if it is **not an undue hardship** and does **not pose a direct threat** to self or others
- ◆ Accommodations are not required if they will create an **undue financial or administrative hardship** or a **direct threat**



# Reasonable Accommodations (cont.)

- ◆ Employers may choose among **effective** accommodations
- ◆ Accommodations **need not be the ones requested**, as long as they are effective in removing pertinent barriers
- ◆ Employers do **not have to provide personal use** items or assistance accomplishing personal care activities
- ◆ Employers do **not have to remove essential job functions**
- ◆ Employers usually do **not have to allow continued unpredictable or unreliable attendance**
- ◆ Employers do **not have to accommodate** an employee who is not **otherwise qualified**

# Potential Accommodations

- ◆ Worksite Modifications
- ◆ Telecommuting
- ◆ Shift Changes
- ◆ Break Schedule Modifications
- ◆ Time Off
- ◆ Vision or Hearing enhancements
- ◆ Memory Aids or Reminders

# Potential Accommodations (cont.)

- ◆ **Reassignment:** Necessary when no other accommodation is effective
  - ◆ To a vacant position for which the employee is qualified
  - ◆ If no position is available look for a reasonable period 60-90 days
  - ◆ Show the employee how to review available state jobs
  - ◆ Document your weekly job search (print a copy of open positions)
  - ◆ Contact the employee every two weeks to review what jobs are available
  - ◆ Document any refusal to accept an offered position

# Problems with the Interactive Accommodation Process

- ◆ Applicant fails to **specify limitations, major life activities, reasonable accommodations**, etc.
- ◆ Applicant fails to provide **medical documentation**
- ◆ Healthcare provider fails to **document functional limitations** or recommend appropriate accommodations
- ◆ **Management determines** accommodations are not necessary and does not provide them
- ◆ Management **grants “unofficial” accommodations** for extended periods (in effect removes essential functions)

# Undue Hardship

- ◆ **Nature/net cost** (considering tax credits, deductions, outside funding)
- ◆ Overall financial resources of facility
- ◆ Number of employees at facility
- ◆ Nature of operation (structure, control, workforce, geographical locations, administrative autonomy, relationship of facility to entity)
- ◆ Impact of accommodation on facility
- ◆ Impact of accommodation on other employees
- ◆ Impact on terms of negotiated agreement

# Direct Threat

- ◆ An individual is NOT “qualified” under the ADA if his or her health conditions present a direct threat to him/herself or to others. *Chevron USA, Inc. v. Echazabal*, 536 U.S. 73 (2002); and
- ◆ No reasonable accommodations would eliminate or substantially limit the threat

## Direct Threat (cont.)

◆ Direct threat factors:

- ◆ **Duration** of risk

- ◆ **Nature/severity** of potential harm

- ◆ **Likelihood** that potential harm will occur

- ◆ **Imminence** of potential harm

## Direct Threat (cont.)

- ◆ Covered entities generally bear the burden of proving the individual presents a *significant risk of substantial harm*, based upon objective, scientific information
- ◆ The courts generally grant **greater latitude** to covered entities that are directly involved in **public safety**
  - ◆ 10<sup>th</sup> Cir. *McKenzie-Benton*



# Performance Standards & Conduct

- ◆ An entity **need not lower or change its quality, quantity, or production standards** as an accommodation
- ◆ If the disability **does not cause the misconduct** the individual **may be held to the same conduct standards**
- ◆ If the disability **causes the misconduct**, an entity **may apply discipline** provided the **rule is applied uniformly and is consistent with business necessity AND other employees** are held to the same standard

# Performance

- ◆ It is generally **inappropriate for employers to focus discussion** about a performance or conduct problem **on an employee's disability**
- ◆ Focus should be on **correcting the problem**
- ◆ It is generally **preferable for the employee**, rather than the employer **to raise a disability issue**
- ◆ Accommodation requests are **prospective**:  
Generally, discipline does not need to be rescinded after an accommodation request

# Conduct

## ◆ Employers may prohibit:

- ◆ Violence or threats of violence
- ◆ Stealing
- ◆ Destruction of property
- ◆ Insubordination
- ◆ Showing disrespect to clients, customers, and in public
- ◆ Inappropriate behavior between coworkers
- ◆ Alcohol or illegal drug use

◆ \* If termination is appropriate for the conduct, the employer may usually terminate without further review of the request for reasonable accommodation after approval from Risk Management

# Confidentiality

- ◆ Information may only be disclosed to:
  - ◆ Supervisors, Managers, Professors, who **need to know** about **work restrictions** and **accommodations**
  - ◆ **First aid and safety personnel** for treatment or evacuation
  - ◆ **Government officials investigating** compliance with federal laws
  - ◆ Relevant information to **state workers' compensation officers** or second injury funds and insurance companies when required to provide life or health insurance

# How Will ADA-AA Affect HR?

- ◆ Increase in the number of employees seeking reasonable accommodations – which was intended by Congress
- ◆ Focus shift from documentation of formal evidence of disability to supporting the need for requested accommodations
  - ◆ Qualification should not require extensive analysis

# How Will ADA-AA Affect HR?

- ◆ Spend less time determining if an impairment is a disability and focus on reasonable accommodation
- ◆ Documentation focus:
  - ◆ Self-report/Intake interviews
  - ◆ Observational and narrative evaluations
  - ◆ The effectiveness of the accommodation
  - ◆ Adaptive strategies

# ADA-AA Employment Compliance Guide

- ◆ Review and revise policy and practice
  - ◆ FMLA
  - ◆ Temporary Transitional Assignments
  - ◆ Post-offer medical exams
- ◆ Train management
  - ◆ To recognize requests
  - ◆ Promptly refer health issues to HR
  - ◆ Ensure employees are not “regarded as” disabled
  - ◆ Avoid Retaliation
- ◆ Revisit recent denied accommodation requests

# ADA-AA Employment Compliance Guide (cont.)

- ◆ Look at employment actions more closely
  - ◆ Discipline
  - ◆ Termination
  - ◆ RIF
- ◆ Play it safe and watch for new ADA regulations in the future
- ◆ Don't count on defeating claims on summary judgment



# Keys to Avoiding Liability

- ◆ **Immediately commence the interactive process**
- ◆ **Display good faith** during the entire interactive process
- ◆ Obtain the **medical documentation** with functional limitations and prognosis
- ◆ **Research options and be creative** in identifying and evaluating possible **accommodations**
- ◆ Make and **document clearly defensible decisions with specificity**

# Keys to Avoiding Liability (cont.)

- ◆ **Keep records of requests made, granted, and denied with detailed analysis for each decision and any associated hardship**
- ◆ **Coordinate ADA, FMLA, Work Comp, and LTD**
- ◆ **Maintain accurate job descriptions and position analysis**
- ◆ **Maintain Confidentiality**
- ◆ **Consult with Risk Management before denying an accommodation request**

# Questions?

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